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Supreme Court of the United States

October Term, 1978

No. 78-1388

THOMAS LaMORTE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OF THE UNITED STATES

THOMAS LaMORTE,

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-against-

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, THOMAS LaMORTE, respectfully requests that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered on or about February 8, 1979, affirming a judgment of the District Court for the Eastern District of New York entered on or about September 22, 1978, convicting petitioner after a jury trial of the crimes of Conspiracy to import and to possess with intent to distribute cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 846; also, convicted of the crime of Possession with intent to distribute and importation of Cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and Section 952(a).

As a consequence of these convictions, the petitioner was sentenced to a term of seven (7) years imprisonment to be followed by a special parole term of ten (10) years; in addition, the Court ordered that the petitioner be fined $7500 on each count, consecutively, making a total fine of $22,500.00

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction without written opinion.

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit, was rendered from the bench on February 8, 1979.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1) and under Rule 19(1) of the Rules of the Supreme Court.

QUESTIONS INVOLVED

1. Was the petitioner's Constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution violated when the government used the petitioner's statements having failed to establish that the petitioner had made a free, knowing, and intelligent waiver of his constitutional rights at or about the time of his arrest and the questioning by the agents of the government?

2. Did the District Court commit reversible error in denying petitioner's motion for a mistrial based upon governmental misconduct in allowing the use at trial of the testimony of Customs Inspector Resnick, the key government witness, that was materially altered from his suppression hearing sworn testimony on the key issue in the defense of the indictment, to wit, waiver of petitioners fifth and sixth amendments rights.

RULES OF THE SUPREME COURT

Rule 19, Considerations Governing Review on Certiorari.
1. A review on writ of certiorari is not a matter of right, but

of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state of territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or *has decided a federal question in a way in conflict with applicable decisions of this court;* or *has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.*

STATEMENT OF THE CASE

The Petitioners, LaMorte and Shear, were returning from Beirut, Lebanon (39)* by way of London; they arrived at JFK on TW Flight No. 701 at approximately 7:50 p.m. on February 2, 1978. After retrieving approximately five pieces of luggage, they went directly to customs; the custom agent on duty was Agent Resnick. After giving their passports and completing custom declarations (27) they then identified which pieces of luggage belonged to each one (the black-LaMorte; the blue-Shear) (35). Agent Resnick then examined the bags and asked if the two large pieces were new (39-40). LaMorte then stated that Air France had lost their luggage going overseas and the two pieces of luggage under question were replacements (41). This fact was apparently verified by DEA Agent Giaimo (154-155). Agent Resnick then felt a heaviness in the bottom of one of the

pieces of luggage after he had apparently emptied its contents on the counter. Then he inserted a knife in the bottom of said bag and found a white powder (41-42). He then summoned the senior Inspector Ruoff. Agent Resnick then took the white powder and conducted a field test (O.D.V.) in the staff office. A positive cocaine reaction resulted (43). Immediately thereafter, LaMorte and Shear, were then escorted to the staff office; at approximately 8:50 p.m. (56). Agent Resnick read the Miranda rights to both individuals and advised them that they were under arrest (44-45); Shear then became very nervous (73-74) and quite upset (75). The DEA agents arrived at approximately 9:15 p.m. (151) and they then spoke to both petitioners at the DEA office at the International Arrivals Building (156). A full search of the luggage revealed that a cardboard, the size of the case itself, was glued in place and sealed with masking tape. Several packages of gauze wrapped plastic bags containing cocaine were removed from each suitcase (49 and 55).

DEA Agent Giaimo readvised both of the petitioners of their rights (124). Again, later on, Agent Giaimo reiterated the Miranda rights approximately an hour later at the DEA office and for the first time LaMorte related that he was promised $50,000 to smuggle the cocaine into the United States and deliver it to a Hussein Jaffari Massaholto (128-129) on February 6, 1978. He added that he had told Shear that the suitcases contained hashish (130). There was no testimony in any manner or form as to when LaMorte told Shear that the suitcases contained hashish. Shear eventually stated that she had been told there was hashish in the suitcases. The statements were allegedly made at approximately 12:00 a.m. (131).

Both petitioners testified and denied knowledge, intent, and participation in the cocaine smuggling operation.

The petitioner LaMorte testified that he reported his luggage lost in December of 1977 while en route to Beirut, Lebanon (331) and after approximately two weeks subsequent to the report, Air France remunerated the petitioner (334); on or about January 31, 1978, Air France suggested a particular luggage store to replace lost luggage and damaged luggage; the two bags (luggage) which were paid for by Air France were subsequently delivered to their hotel in Beirut, Lebanon (247). Shear and LaMorte further testified that Shear packed all of the clothing in their dry cleaning wrappers (248-249) (358) and individually packed the clothing separately from those of Mr. LaMorte.

While at Kennedy Airport at or about the time that the luggage was opened and being inspected, the petitioner Shear immediately told Agent Resnick that the clothing she had packed in the black bag was now in the blue bag and in complete disarray (249). She stated that the bags were obviously not hers (253-255). This was heard by LaMorte (367).

Both of the defendants acknowledged receiving Miranda warnings but stated that each over and again had requested an attorney (358, 259, 260-261, 263, 268-269, 270-271, 274, 278, 374, 381, 403).

Shear appeared to be shocked (372). LaMorte was told he would face a total of 75 years in jail (381) and that Shear would be sent to Rikers Island Prison (381). Shear became visibly emotionally upset in LaMorte's presence (386), becoming close to being hysterical (386). The agents told Shear, in LaMorte's presence, that Shear would be raped and molested in jail, and would be an old woman before she got out of jail (389). LaMorte was told he could receive a sentence of from 25 years to life (389). LaMorte tried to explain that the sequence of baggage claim numbers on his luggage seemed strange to him (394), but nobody seemed to listen (398).

At 2:30 a.m. LaMorte believed Shear had had it, and seemed ready to be committed (398). Agent Giaimo kept saying that they should cooperate and they would make it easy on

Shear (398). LaMorte made the statements attributed to him to help Shear and himself, feeling that the truth did not work in stopping what he perceived to be a nightmare (411). The statement was not true; it was made up by LaMorte (411, 412). LaMorte felt that he was protecting Shear, the woman he had lived with for three years (413); as long as Agent Giaimo was talking to Mr. LaMorte, he was not talking to Miss Shear (413).

There was no statement that was recorded, written, or preserved in any manner or form. There was no written waiver of the constitutional rights executed by either of the defendants, although such written waivers were available to both DEA agents and custom agents.

PERTINENT TESTIMONY AT TRIAL AND THE SUPPRESSION HEARING PERTAINING TO THOMAS LaMORTE'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT VIOLATIONS CLAIMS

Agent Resnick testified at the trial (at pages 44-45):

"THE COURT: Yes. You read the entire thing that you read him. Read it to them.

THE WITNESS: Okay. I made myself known. I said, 'My name was Resnick, U.S. Customs Inspector, Badge Number 1071, advised the person that he was being detained, was under arrest, and I said "Before we ask you any questions, it is my duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in Court, or in other proceedings. You have the right to consult an attorney before making any statement or answering any questions, and you may have him present with you during questioning. You may have an attorney appointed by the United States Magistrate or the Court to represent you if you cannot afford or otherwise obtain one. If you decide to answer any questions now with or without a lawyer, you still have the right to stop the

questioning at any time, or to stop the questioning for the purpose of consulting a lawyer. However, you may waive the right to advice of counsel or your right to remain silent and answer questions to make a statement without consulting a lawyer, if you so desire. *Do you understand your rights? Mr. LaMorte said 'yes'. Do you waive your rights? He said 'No'.* I then went to Miss Shear, I identified myself. I read her the same rights from the card and she answered, 'yes'. 'Do you understand your rights?' and she said — 'Do you waive your rights?' She said, 'No' ".

Agent Resnick was examined:

(Page 74)

Q. At this juncture, she (Shear) said she did not wish to answer any questions, am I correct?

A. Yes.

Q. At this juncture can you describe her demeanor right after she said 'I don't want to answer any questions."

A. No. She was just sitting down.

(Pages 80-81)

Q. Now sir, these people were arrested for possession of cocaine?

A. Yes.

Q. They were given their Miranda warning?

A. Yes.

Q. And refused to make any statements?

A. Yes.

Counsel forthwith applied for a mistrial (57).

MR. WASHOR: Your Honor, I submit respectfully, I move for a withdrawal of a jury and a declaration of a mistrial predicated on a deliberate omission by this witness during the pretrial witness that was stated over here, the entire pretrial hearing or the majority of the pretrial hearing was directed towards the admissibility of statement and there were extensive examinations of this witness.

THE COURT: Statements of this witness subsequent to the giving of rights. What statements were there subsequently?

MR. WASHOR: All of the statements are being offered.

THE COURT: Subsequent to the giving of rights, that this witness had testified to, what statements?

MR. WASHOR: The statements eventually are going to be introduced by the Drug Enforcement Administration.

THE COURT: Do you know what he's talking about?

MR. PIERCE: No.

MR. WASHOR: He testified under oath they did not waive their rights and that was my argument.

THE COURT: Wait a minute. What statements are subsequent by this witness?

MR. WASHOR: As follows: The statements not necessarily by this witness.

THE COURT: Subsequent.

MR. WASHOR: Subsequent to this.

THE COURT: By this witness?

MR. WASHOR: Not particularly by this witness, but the —

THE COURT: Your application is denied because it doesn't change the complexion and I don't believe there's any statements that you could give me that are subsequent. This man said that the man said he did not waive his rights.

MR. WASHOR: And the girl I didn't waive her rights. Can I just advance, your Honor?

THE COURT: Yes.

MR. WASHOR: I made my objection.

THE COURT: The application is denied.

MR. KALINA: *I join in that, your Honor.*

MR. SCHLAM: Is Your Honor's practice to have a morning recess? You would normally go through the reason why I would like to take five minutes.

THE COURT: We can take a recess.

MR. WASHOR: Your Honor, will you —

THE COURT: There were no statements made to this witness.

MR. WASHOR: That is not my theory, but you've already ruled.

THE COURT: *I would say this too, it is the Court's opinion that Mr. Resnick doesn't appreciate the difficulty of what the waiver is.*

MR. WASHOR: Judge, I agree with you.

THE COURT: And I'm telling you it's a matter of understanding that's created this problem and I'm telling you this for the record.

MR. WASHOR: Judge, before you leave, just for a second, I agree with you. Now, if you take a man who is an individual like Resnick and you can honestly say that he does not appreciate —

THE COURT: Because his testimony —

MR. WASHOR: Judge, bear with me for just a second.

THE COURT: It was difficult.

MR. WASHOR: If you look at Resnick and you can conclude in all h onesty that he is confused, that's a difference between waiving —

THE COURT: It is just a confusion.

MR. WASHOR: Judge, please hear me out.

THE COURT: It was an understanding of some people that they did waive.

MR. WASHOR: Will you let me follow the — let me put it on the record.

THE COURT: What?

MR. WASHOR: If a trained Government witness can make the honest error of mistaking the difference between waiver and exercising the rights —

THE COURT: There's no statement subsequent to this that has a validity.

MR. WASHOR: It is not a statement made two minutes later. If they took a position that they do not want to waive their rights, then the Government has even a greater burden of —

MS. PIERCE: The Drug Enforcement Administration officers were not there at the time.

MR. KALINA: The defendant says "I don't waive my rights," then later on he waives his right.

MS. PIERCE: That is not what he said.

MR. WASHOR: I'd rather go on before the cross, before recess.

THE COURT: We'll take a recess.

MR. WASHOR: Can we request—

THE COURT: We're not doing anything at this point.

MR. WASHOR: Can we request that the witness, not during the hiatus—

THE COURT: We're just going to take a recess.

MR. WASHOR: I'm asking you—

THE COURT: I'm not doing it; that's what I'm telling you.

REASONS FOR GRANTING THE WRIT

POINT I

THE GOVERNMENT FAILED TO ESTABLISH THAT THOMAS LAMORTE HAD MADE A FREE, KNOWING, AND INTELLIGENT WAIVER OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Contemporaneous with the search herein, the petitioner Thomas LaMorte acknowledged that the original luggage used in the trip abroad from the United States had been lost and that the Airlines had paid for the "new luggage," now the subject of the instant search. At this point in time, the petitioner Thomas LaMorte was formally arrested and advised of his "Miranda" rights; Customs Agent Resnick unequivocally testified (at the trial) that the defendant Thomas LaMorte refused to waive his rights (44-45, 80-81).

Thereafter, the defendant Thomas LaMorte was readvised of his "rights" in excess of two or three occasions and eventually made a statement introduced at trial (163).

(LaMorte p. 374)

Q: What did Resnick say then?

A. He read our rights and he said "Do you understand, do

you wish to waive your rights?" And we said, "No, we would like to speak to an attorney. He went back to the suitcases again and Agent Smith came in and he asked Inspector Resnick, I think, if they had read our rights and he said "yes," and he said, "Well, lets read them to them again." So Agent Smith came over and he read our rights and when he was done, we answered, I think, negatively, once again.

Q. Were these read to you collectively, totally, or did they speak to you once and then to Carol?

A. No they read it to us together and one of them said, "They obviously don't understand their rights, read them to them again.

Q. Do you remember who said that?

A. I think it was Resnick. So Inspector Smith read them to us again, and we denied all knowledge . . .

(377)

Q. About what time was this?

A. This must have been after 9, 9:15, 9:30.

(378)

Q. Who did you see?

A. Well, it was very hard for me to see Carol, because they were standing so close to her.

(380)

Q. Was that two searches of the body?

A. That was two searches of my body.

Q. Two strip searches?

A. Yes.

At page 381 LaMorte testified that the agents told him of three 25 year sentences. LaMorte further testified that he was told he would be old and gray before he got to see daylight again. He was told Carol would go to Rikers Island, and would be raped and molested.

(383)

Q. And did he ask you were you going to deliver the suitcases somewhere and you told him no?

A. First he told me that they picked up the two Lebanese people outside by the belt that were waiting to receive the cocaine.

Agent Giamo testified (128)

Q. Did you tell him it would help him; yes or no?

A. I told him I thought it might help him if he cooperated.

Q. What about Carol? Did you tell him it would help Carol Shear?

A. Yes.

And at page (130):

Q. Did you tell Mr. LaMorte he could get 15 years or 25 years to life?

A. I believe I told him he could get 15 years.

And at Page (135):

Q. Did you tell him that Miss Shear could get 15 years also?

A. I said that to him, what he could get. I don't recall telling him what she could get; other than she was in the same position.

LaMorte testified at trial that petitioner and agents left customs at 10 to 10:15 P.M. (384); that Shear was physically exhausted (385), and close to being hysterical (386). When he was fingerprinted, he had handcuffs on (387).

LaMorte, at 2 or 2:30 a.m., told Agent Giamo that the luggage claim tickets were not in order (397), but nobody seemed to really want to listen (398).

(LaMorte 398)

A. It started about 2:30, quarter to three in the morning. By now, Carol had had it. She was right about ready to be committed so, Agent Giamo kept saying, cooperate, we'll go easy on her, we'll make recommendations here and we'll make recommendations there and . . .

And at (403)

Q. Did you ask to make a phone call or any thing like that?

A. Yes.

Q. What happened?

A. The question just went as if it was never asked.

Q. No one responded?

A. No one responded.

And at (411)

A. I tried the truth. The truth didn't work. They obviously wanted something; so, as the evening progressed, the story progressed along with the evening.

And finally at (413)

Q. Did you realize that you were telling him a story that could implicate you?

A. Well, I felt talking to him, I wasn't under oath and I knew as long as I was talking to him, he wasn't talking to Carol.

If an individual's will was overborne, his confession is inadmissible because coerced, whether by physical or psychological pressure. *Townsend v. Sain* 372 U.S. 293; *Colombe v. Conn.* 367 U.S. 568. Threat or trick will show that a waiver was not voluntarily made; and length of time of interrogation is strong evidence against valid waiver, *Miranda v. Arizona* 384 U.S. 476.

A valid waiver is not to be presumed merely because a confession was obtained. *Carnley v. Cochran* 369 U.S. 506.

This Supreme Court has provided specific guide lines under Miranda, to render the proper and legal admonishments of rights; however, this is not so with regard to the "waiver" aspect. There are no guide lines for the waiver of an individual's rights. This issue should be decided by this court pursuant to Rule 19 of this Court.

Both Federal and State Law Enforcement officials have adopted a written waiver form, to aid in meeting the onus of proving a valid waiver by an accused. While the Appellate Courts have held that the mere absence of a written waiver form would not preclude, as a matter of law, an effective waiver of one's rights (*U.S. v. Hayes*, 385 F.2nd 375, 4th Cir. 1967), it was reasoned and held that the prosecution's heavy burden of showing a valid waiver, was thereby increased where the waiver form was not signed; it becomes apparent that the failure or refusal to sign a waiver form may well be indicative of the accus-

ed's lack of understanding of the original Miranda rights as well as the accused's intent not to waive the Miranda rights. (*U.S. v. Nielson,* 392 F. 2nd 849, 7th Cir. 1968).

The totality of circumstances must be examined to determine if defendant's will was overborne due to psychological pressure and coersion. *Greenwald v. Wisconsin* 390 U.S. 519.

Johnson v. Zerbst (304 U.S. 458) holds that an intentional relinquishment of a known privilege must be established by the Government at the Suppression hearing. A heavy burden of showing an intelligent, voluntary and knowing waiver is required (*Schneckloth v. Bustamonte* 412 U.S. 218) (see also, *Van Moltke v. Gillies,* 232 U.S. 708; *Glazer v. U.S.* 315 U.S. 60).

The criteria to assess the effectiveness of a waiver has been applied to other trial rights such as the right to confrontation, to a jury trial, to a speedy trial, and the right to be free from twice being placed in jeopardy. (*Brookhart v. Janis,* 384 U.S. 1; *Adams v. U.S.,* 317 U.S. 269; *Barker v. Wingo,* 407 U.S. 514; *Green v. U.S.,* 355 U.S. 184).

The trial guarantees that have been alluded to above also apply to the pre-trial stage of the criminal process and are similarly designed to protect the fairness of the trial itself. (*Schneckloth, supra*).

In *U.S. v. Wade* (388 U.S. 218) the Court indicated that the standard of a knowing and intelligent waiver must be applied to test the "waiver" of counsel at a particular lineup.

It is urged that in order for a waiver of constitutional rights to be effective in any context it must at the very least be clear and unequivocal. (*Fuentes v. Shevin,* 407 U.S. 67).

In the case at bar, the petitioner Thomas LaMorte unequivocally refused to waive any of his rights. Thereafter, he was repeatedly readvised of the "Miranda" rights. In *Brewer v. Williams* (430 U.S. 387), the Supreme Court recognized that the statements given by the defendant were obtained only after the law enforcement's use of psychology upon the person of the defendant. The Court recognized that the questioning in *Brewer,* supra, was done with the specific intent to illicit in-

criminating statements. In the instant case, one can only logically and legally conclude that after LaMorte refused to waive his constitutional rights, that the repeated Miranda warnings acted and constituted a psychological approach upon his person with intent to illicit incriminating statements. The repeated pressure of the several questioning, seeing his fiancee, hysterical, telling what he claimed to be the truth only to have it fall on deaf ears, together with all other elements of the conversations, all caused enormous psychological pressure to be brought to bear upon his will; and it was overborne.

It is now basic and fundamental that the prosecution has the weighty obligation to show and demonstrate that the waiver was knowingly and intelligently made. In consideration of this onus upon the prosecution, it is suggested that consideration be given to the underlying facts and the failure of the law enforcement agencies to utilize what is commonly known as a "waiver form."

According to government version of the underlying facts related to the custodial interrogation herein, LaMorte did not specifically request an attorney; this of course is factually disputed when viewing the petitioner's version of the incidents in question at the trial. He did, however refuse to waive his rights with agent Resnick and that refusal was not communicated to the next questioner. The supreme Court of the United States has held that the right to counsel does not depend upon a specific request by the defendant, (*Carnley v. Cochran, supra; Miranda v. Arizona, supra*) as every reasonable presumption will be made against waiver. *(Brookhart, supra; Brewer, supra).*

In the authoritative decision regarding the admonition of constitutional rights, in *Miranda v. Arizona, supra*, the Court held at page 723:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. At this point

he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."

As enunciated in *Escobedo v. Illinois* (378 U.S. 478), if the interrogation should continue without the presence of an attorney and a statement should be taken, an exceptionally heavy burden rests upon the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retain or appoint counsel.

An express statement that the individual is willing to make a statement and does not want an attorney closely followed by a decision to speak with law enforcement officers could constitute a waiver; but a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was eventually obtained. (*Miranda, supra*).

In *Carnley v. Cochran, supra,* the Court held:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Again, in *Miranda, supra,* the Supreme Court held that where in-custody interrogation is involved, there is no room for the contention that the privilege is in fact waived if the individual defendant answers some questions or gives some information on his own prior to invoking his right to remain silent at the time of interrogation.

In the instant case, there were hours and hours of in-custody procedures and questioning. Considering that at the initial stage of receiving the Miranda warnings, the petitioner, LaMorte, in fact refused to waive his constitutional rights, coupled with lengthy period of time involved herein, and the failure to have waiver forms signed by the defendant, leads to the conclusion that the Government has failed to demonstrate a

knowing and intelligent waiver by the defendant. In *Miranda, supra,* the Court held at page 724 and 725:

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused *did not* validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege . . . The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."

> "No distinction may be drawn between inculpatory statements and statements alleged to be merely exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver requirements for any other statement."

It is undisputed that the original law enforcement agency advising LaMorte of his constitutional rights had in fact conveyed the same to the other agents at the time of turning him over to their custody; there is no question that the obligation of the Custom Agent in relating these facts to the Drug Enforcement Agency should haveindicated unequivocally that LaMorte refused to waive his rights. If there be any argument or dispute as to such fact, it is brought to this Court's attention that one arm of the law has the burden of letting the other arm of the law know exactly what has or has not been done with regard to a defendant. In *Santobello v. New York,* 404 U.S. 257, this Court stated at page 262:

"The staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done."

Agent Resnick did not tell Agent Giamo of LaMorte's refusal to waive his rights.

It becomes reasonably obvious that the Drug Enforcement Agency in its readvising of LaMorte of his constitutional rights on numerous occasions after the first admonishment, coupled with the long hours of interrogation, and the failure to sign any waiver forms, together with the psychological coersion present was designed to extract a statement from the petitioner when he had initially refused to waive his rights.

It is respectfully submitted that during the pre-trial hearing coupled with the testimony of the defendants at trial herein, that the Government has failed to meet the burden of demonstrating a clear and unequivocal waiver of Thomas LaMorte's constitutional rights.

Finally, the use of petitioners' statements by government, in their case in chief, violated due process as well as the Elkins Mapp bar to the use of illegally obtained evidence (*Elkins v. U.S.* 364 U.S. 206; *Mapp v. Ohio,* 367 U.S. 643). The progeny of *Elkins,* supra, deals with 5th Amendment as well as 4th Amendment violations.

POINT II

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DENYING PETITIONER'S MOTION FOR A MISTRIAL BASED UPON GOVERNMENTAL MISCONDUCT IN ALLOWING THE USE AT TRIAL OF THE TESTIMONY OF INSPECTOR RESNICK, THE KEY GOVERNMENT WITNESS THAT WAS MATERIALLY ALTERED FROM HIS SUPPRESSION HEARING SWORN TESTIMONY ON THE KEY ISSUE IN THE DEFENSE OF THE INDICTMENT, TO WIT: WAIVER OF PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS.

At trial, Agent Resnick directly contradicted his pre-trial testimony on the major issue of the suppression hearing, to wit; waiver. At the hearing his testimony was as described hereinbefore, all indicating waiver. After hearing the waiver testimony of Agents Resnick, Giamo, Castillo, Cipriano, Ruoff, Reilly and Bauer at the suppression hearing, the petitioner did not testify therein. He did testify at trial, as has been hereinbefore indicated.

Hearing (pg. 73) of Resnick:

Q. Mr. LaMorte told her to keep quiet, in words to that effect?

A. Yes.

Hearing (Pg. 98) of Resnick:

Q. In fact he said nothing other than the one statement you attributed to him before, correct?

A. Correct.

It is obvious that Agent Resnick's *trial* testimony, truthful on the question of defendant's refusal to waive his rights, would have had a substantial impact on the Court at the suppression hearing alone nonetheless in conjunction with the testimony of petitioners LaMorte and Shear.

Granted, LaMorte and Shear did not testify at the suppression hearing; but only after hearing six government agents back up Resnick's substantial misstatement. After Resnick's trial testimony, a proper remedy was available; mistrial. Motion for same was made and denied.

Reopening of the suppression hearing would have been of little avail at that stage of the proceedings; openings had been made by all parties addressing themselves to the issue of the statements of the defendants. Accordingly, the court should have granted petitioners motion for a mistrial (57-62) and then order the reopening of the suppression hearing, in the light of Resnick's substantially changed testimony, thus enabling the recalling of witnesses (Ruoff and Giamo, for example) as well as the petitioners, whose testimony obviously would have supported Resnick's testimony at trial of non-waiver. At the least, with or without a mistrial, petitioners were entitled to a reopening of the hearing on the motion to suppress statements so that defendants could testify and/or recall agents Ruoff and Giamo, as well as further examine Resnick out of the presence of the jury.

By failing to do so, the trial court countenanced governmental misconduct in putting a witness before the Court, at the suppression hearing, whose testimony was false and grossly misleading. Knowledge of the nature of such misleading and false testimony is chargeable to the government herein.

The failure to grant a mistrial prevented a fair trial in violation of petitioner's 14th amendment rights, and denied him the right under the 6th amendment to effective assistance of counsel. Having the government and two defense attorneys commit, in their opening remarks to the jury, to bring forth testimony about the statement of petitioner, highlights the predicament of the petitioner. This court might well consider this a serious breach of duty by the government under *Brady v. Maryland* (373 U.S. 83) (1963), *United States v. Morell,* 524 F.2d 550 (Sec. Cir. 1975), *Barbee v. Warden,* 331 Fed. 2d 842 (4 Cir. 1964).

When faced with a situation like the one at bar the lower court herein should have conducted a hearing, at the least, pursuant to the dictates of *United States v. Hilton,* 521 Fed. 2d 164 (2 Cir. 1975) and *United States v. Rosner,* 516 Fed. 2d 269 (2 Cir. 1975). *This is an issue requiring this court* to exercise its power of supervision under Rule 19 of this court.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED.

Respectfully submitted,

ROBERT I. KALINA
A Member of the Bar of the United States
Supreme Court
Attorney for Petitioner
on Petition for Certiorari

APPENDIX "A"
CONSTITUTIONAL AMENDMENTS

ART. V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation.

ART. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

ART. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, is as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B
JUDGMENT OF THE UNITED STATES COURT OF OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of February one thousand nine hundred and seventy-nine

Present: HON. STERRY R. WATERMAN, HON. WALTER R. MANSFIELD, HON. WILLIAM H. TIMBERS, *Circuit Judges,*

78-1350, 78-1351

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS LaMORTE and CAROLE SHEAR,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO, *Clerk*

ARTHUR HELLER, *Deputy Clerk*

see

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